ORIGINAL

No. 00-692

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

JAMES H. GOMEZ, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

RESPONDENT'S BRIEF OPPOSING CERTIORARI

CHARLES M. BONNEAU
Attorney at Law
980 9th St. Suite 1400
Sacramento, CA 95814
(916) 444-8828
FAX (916) 441-5810
Counsel for Respondent

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Respondent MITCHELL ALFRED PATTERSON respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 223 F.3d 959 (9th Cir. 2000).

The factual and procedural history is set forth in the Circuit Court opinion. Additional facts will be referenced as necessary to Respondent's argument.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner proposes a change in constitutional protections which would allow the presumption of key facts which the prosecution is otherwise required to prove.

The constitutional error which is to be avoided here is the withdrawal or prejudgment of an issue, by an instruction that the law raises a presumption of intent from the commission of a particular act. *Morissette v. United States,* 342 U.S. 246, 274 (1952); *Sandstrom v. Montana,* 442 U.S. 510, 522 (1979). The Circuit Court of Appeals here held that the instruction on presumption of sanity amounted to an instruction that the defendant was a person of sound mind, and that this instruction shifted the burden of proof at the guilt phase of the trial, when the defendant's mental state was very much in issue.

Petitioner relies on language from the opinion of the district court. There it was asserted that "there was no instruction link-up… between [Respondent's] sanity and the mens rea issues." Findings and Recommendations of Magistrate Judge, Appendix E to Petition for Writ of Certiorari, p. 10. As Petitioner would have it, in order to find constitutional error there must be an explicit instruction connecting the presumption and the mental element of the offense.

To the contrary, the more powerful and therefore more dangerous burden-shifting instruction may be directed to a portion of the evidence itself. As stated by this Court in *Francis v. Franklin,* 471 U.S. 307, 313 (1985),

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. [358], at 364 [1970]. This "bedrock, 'axiomatic and elementary' [constitutional] principle," *id.*, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. [Citations.]
>
> (Emphasis added.)

It is not hard to demonstrate that a presumption affecting the weight and consideration of evidence may be at least as powerful as a presumption which goes directly to an element of the offense. Consider the following instructional language which was at the focus of the opinion in *Francis v. Franklin, supra.*

> ... The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted....
>
> 471 U.S. at 311; emphasis added.

Would it not have been even worse if the jury in *Francis v. Franklin* had been told to presume that the defendant was "a person of sound mind and discretion"? That is what the *Patterson* jury was told, through the presumption of sanity instruction. The *Patterson* instruction went to the heart of the issues between the parties. "If the jury is required to presume the nonexistence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for first degree murder, that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant." *Patterson v. Gomez, supra,* 223 F.3d at 965.

The departure from current law proposed by Petitioner is unnecessary and unwarranted. Just as circumstantial evidence may be just as persuasive as direct evidence, so a presumption concerning a factual issue may be just as devastating to the outcome of a trial as an instruction to presume an element of the offense. A change in the rule of *Francis v. Franklin*, as proposed by Petitioner, would needlessly debilitate the constitutional principles which insure that the State bears the burden of proof.

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2. The record augmentation issue does not meet the Rule 10 standard for review by this Court.

Petitioner does not argue that the record augmentation in this case, to include the state trial court's pre-trial admonition to the jury, was improper or unauthorized. Impliedly, Petitioner concedes that the federal appellate court may augment the record on its own motion.

Rather, Petitioner complains of lack of notice. No citation is offered to any fundamental right which was violated by lack of notice in these circumstances. Rather, complete record augmentation should be encouraged to promoted accuracy and uniformity in appellate opinions.

No petition for rehearing was filed in this case. F.R.A.P. Rule 40. Petitioner's complaint on this minor matter should have been directed to the Circuit Court.

In any event, no prejudice can be established. The purpose of the augmentation was to aid Petitioner, to clear up any possibility that the state trial court may have given preliminary jury instructions which explained the term "sanity" as it was later used in the burden-shifting instruction.

Petitioner goes on to provide additional transcripts of the jury voir dire, which are claimed to shed some light on the point. Appendix J. But the time to offer those transcripts was when the issues were joined in the lower courts, state and federal.

Jury voir dire is not jury instruction. No cited decision, and no decision known to Respondent's counsel, permits the correction of constitutional error in jury instructions by reference to jury voir dire.

For all of the above reasons, this argument does not merit review by this Court.

3. There is no conflict between this Court's opinions in *Cupp* and *Francis*, as shown by the Circuit Court's practice of reviewing the jury instruction in context with all instructions which were read, and with the entire trial record.

Here Petitioner attempts an entirely unique and unprecedented gamut in the guise of a supposed conflict between the opinions in *Francis v. Franklin, supra,* and *Cupp v. Naughten,* 414 U.S. 141 (1973). Chief Justice Rehnquist has cautioned, both in the *Cupp* opinion and again in the dissent to the *Francis v. Franklin* opinion, that the record of the entire trial be examined to determine whether the erroneous instruction infected the entire trial.

The Circuit Court scrupulously adhered to this admonition. Not only did it augment the record for any possibility of a corrective pre-trial instruction, but it relied upon the powerful argument of the prosecutor which built upon the erroneous instruction.

> Mr. Patterson is presumed to be sane. And that[,] in this stage of the proceeding[,] is the law.... [W]hen Mr. Patterson called the psychiatrists[,] he called at the guilt phase and in a sense has put the cart before the horse. Mr. Patterson has attempted to show that because of his mental condition, he didn't form an intent, the intent required or [sic] premeditate or deliberate.... The basis of opinions - and you're going to be instructed to basically disregard any opinion that goes to the ultimate fact. You heard - *the instruction says any opinion from a psychiatrist that goes to intent, premeditation or the ultimate fact[,] disregard. That's the law. At this stage of the proceeding you are to do that. You are to presume he's sane. You are not to accept that opinion.*
>
> ....
>
> Those are the elements. Unlawful killing of a human being with malice aforethought and for first degree murder willful, deliberate, premeditated. We talked about motive not being an element. But the motive was provided for us simply by Mr. Patterson. *He's presumed to be sane in this stage of the proceeding. He was sane.*
>
> 223 F.3d 967-968; emphasis in Circuit Court opinion.

This is precisely the sort of analysis called for in *Cupp* and in *Francis v. Franklin*. There is no tension between those decisions which can be generated from the Circuit Court opinion in this case.

Petitioner proposes to explore the transcript of the jury voir dire to demonstrate that somehow the jury was made aware of the different meanings of the term "sanity," and the different phases of the trial in which the definitions were to apply. But jury voir dire is not the time to instruct the prospective jury members on the law. The purpose of voir dire is to deter-

mine whether jurors can be fair. Cal. Code of Civil Procedure § 223. The discussion may range over many subjects without pretending to instruct on the law.[1]

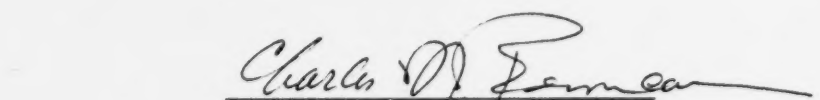
At page 27 of the Petition, Petitioner proposes that the transcript of voir dire be reviewed to evaluate the effect of burden-shifting error in jury instructions. Such review would be unprecedented. It does not assist Petitioner's argument in this case because the error was never alluded to or corrected.

CONCLUSION

For all of the above reasons, this Petition does not qualify the Circuit Court opinion for review on certiorari. Respondent was unjustly convicted. The Petition should be denied.

Date: November 16, 2000

Respectfully submitted,



CHARLES M. BONNEAU
Attorney for Respondent

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[1] See page 146 of the transcript, Appendix J, where the state trial court tried to answer a juror's question about the legal standard for insanity. The court could not find the definition. The transcript does not demonstrate that the legal standard was made clear at any point before the guilt verdict was rendered.